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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an incorporated municipality,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Whether the court below erred in holding that petitioner, a qualified handicapped individual, could not maintain a private cause of action against respondent, a federal contractor, for conceded violations of the provisions of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C., Section 793. ("Section 503")

2. Whether the court below, having unanimously held that Congress, in enacting Section 503, intended to create a federal right in favor of petitioner, erred in ultimately deciding by a divided vote that a private right of action under the congressional enactment was not available to petitioner.

3. Whether, in the light of the statutory language and legislative history evidencing congressional intent to grant the broadest rights and remedies to qualified handicapped persons suffering discrimination in employment, the court below erred in holding that the civil rights granted by Section 503, created no private right of action for petitioner.

4. Whether the court below erred in holding that Section 503 created no right of private action in favor of petitioner where Congress specifically intended to create a federal right in favor of petitioner; where the legislative history of the statute clearly indicated a congressional intent to create a private action; where implication of a private remedy would be consistent with the declared purposes of the congressional enactment; and where the petitioner's causes of action were not traditionally relegated to state law.

5. Whether the congressional mandate embodied in Section 503 requiring the federal agency and federal con-

tractor to embody by agreement provisions for the specific protection of qualified handicapped persons, including petitioner, to gainful employment free from discriminatory practices, vested in petitioner a property entitlement requiring, as a matter of due process, the right of petitioner to invoke judicial relief.[1]

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[1]The caption of the case in this Court contains the name of all parties.

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 5

I.

The Unanimous Finding of the Court Below That the Congressional Enactment Created a Federal Right on Behalf of Petitioner Supports the Implication of a Private Right of Action on Behalf of Petitioner 5

II.

Section 503 Is a Broad Remedial Civil Rights Measure Intended to Protect Qualified Handicapped Persons From Discriminatory Employment Practices. Under Such Circumstances, the Courts Have Uniformly Implied a Private Cause of Action on Behalf of the Members of the Protected Class 7

III.

The Standards and Criteria Enunciated by Supreme Court Decisions for the Implication of Private Remedies Are All Met in This Proceeding. Section 503 Creates a Federal Right in Favor of Petitioner; Congress Intended to Create Such a Remedy; an Implied Remedy Is Consistent With the Legislative Scheme; and the Causes of Action Are Not Traditionally Relegated to State Law 11

A. The State of the Law at the Time Section 503 Was Enacted in 1973 Supports Petitioner's

Page

Contention That Congress Intended Handicapped Persons to Have a Private Cause of Action Under Section 503 11

B. A Private Cause of Action Under Section 503 Is Also Mandated Under the Court's Decisions Subsequent to the Enactment of Section 503 14

IV.

Section 503 Creates a Property Entitlement in Petitioner and Vindication of Petitioner's Entitlement by a Private Action Would Satisfy Due Process and Effectuate Congressional Purposes 26

Conclusion 29

INDEX TO APPENDICES

Appendix A. Opinion of the Court of Appeals ..... App. p. 1

Fletcher, Circuit Judge, Concurring and Dissenting 15

Appendix B. Order of the United States District Court for the District of Arizona 23

Appendix C. Order Denying Petition for Rehearing 29

Appendix D. Pertinent Statutes Involved 30

TABLE OF AUTHORITIES

Cases	Page
Allen v. State Board of Elections, 393 U.S. 544 (1969)	8, 9, 14, 15
Bossier Parish School Board v. Lemmon, 370 F.2d 847 (5 Cir. 1967), cert. den. 388 U.S. 911 (1967)	9
California v. Sierra Club, 451 U.S. 287 (1981)	6, 25
Cannon v. University of Chicago, 441 U.S. 677 (1979)	4, 6, 9, 22, 23, 25
Chaplin v. Consolidated Edison Co. of New York, Inc., 482 F.Supp. 1165 (S.D. N.Y. 1980)	13
Cort v. Ash, 422 U.S. 66 (1975)	4, 6, 15, 16, 21, 22, 23, 25
Davis v. United Air Lines, Inc., 662 F.2d 120 (2 Cir. 1981)	7
Euresti v. Stenner, 458 F.2d 1115 (10 Cir. 1972)	9
FHA v. The Darlington, Inc., 358 U.S. 84 (1958)	21
Fullilove v. Klutznick, 448 U.S. 448 (1980)	21
Gomez v. Florida State Employment Service, 417 F.2d 569 (5 Cir. 1969)	9, 28
J. I. Case Co. v. Borak, 377 U.S. 426 (1964)	11, 12, 14, 15, 22
Lau v. Nichols, 414 U.S. 563 (1974)	9, 28
Logan v. Zimerman Brush Co., ___ U.S. ___, 102 S.Ct. 1148 (1982)	28, 29
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	5
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S.Ct. 1825 (May 3, 1982)	25, 26
Montgomery Improvement Ass'n., Inc. v. United States Department of H.U.D., 645 F.2d 291 (5 Cir. 1981)	10
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	21

Page

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 14

North Haven Board of Education v. Bell ___ U.S. ___ (No. 80-986, May 17, 1982) 20, 21

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) 22

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 21

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 9

Rogers v. Frito-Lay, Inc., 611 F.2d 1074, cert. den. 449 U.S. 889 (1980) 3, 4, 7, 12, 19

Rosado v. Wyman, 397 U.S. 397 (1970) 9, 14, 28

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) 14, 15

Southern Illinois Builders Ass'n. v. Ogilvie, 471 F.2d 680 (7 Cir. 1972) 10

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 ..... 8, 14

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 6, 13, 14

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916) 11

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 6, 23, 24

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 24

Tunstall v. Brotherhood, 323 U.S. 210 (1944) 5, 6, 8, 13

Page

Universities Research Ass'n., Inc. v. Coutu, 450 U.S. 754 (1981) 24, 25

Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967) 12

Miscellaneous

119 Congressional Record, p. 635 (1973) 16

120 Congressional Record, p. 3055 (1974) 18

House Report No. 95-1149, 6 U.S. Code Cong. & Adm. News 7313, 7332, 7352 (1978) 18

Senate Report No. 93-318 and House Conference Report No. 93-500, 2 U.S. Code Cong. & Adm. News 2076-2154 (1973) 16

Senate Report No. 93-1279, 4 U.S. Code Cong. & Adm. News 6389-6391, 6413 ..... 17, 18

Senate Report No. 95-890, 95th Cong., 2d Sess. 19 (1978) 18, 19

U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal year 1983, pp. 40-41 (June, 1982) 13

Statutes

Code of Federal Regulations, Title 41, Sec. 60-741.4 ..... 10, 27

Code of Federal Regulations, Title 41, Secs. 60-741.20 to 741.32 13

Investment Advisers Act of 1940, Sec. 215 24

Public Law 93-516, Title I, Sec. 111(a), Dec. 7, 1974, 88 Stat. 1619 17

Public Law 93-516, Title III, Dec. 7, 1974, 88 Stat. 1631-1634 17

Page

Rehabilitation Act of 1973, Sec. 503 (29 U.S.C., § 793) ..... i, 2, 3, 4, 5, 6, 7, ... 10, 11, 12, 13, 14, 15, 17, 21, 23, 26, 29

Rehabilitation Act of 1973, Sec. 505 18

Rehabilitation Act of 1973, Sec. 794a(b) 18

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 29, Sec. 701(1) 2

United States Code, Title 29, Sec. 701(8) 2, 16

United States Code, Title 29, Sec. 706(6) 3, 17

United States Code, Title 29, Sec. 793(a)(b) 27

United States Code, Title 29, Sec. 794a 2

Voting Rights Act of 1965, Sec. 5 8

Textbooks

Bayh, Senator Birch, Foreword, Symposium Issue on Employment Rights of the Handicapped, 27 De Paul L. Rev. 943 (1978) 19, 20

Comment, 129 U. Pa. L. Rev. 442-446 21

Note, Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973, 79 Mich. L. Rev. 1093, 1111-1112 (1981) 20

Note, Private Rights of Action for Handicapped Persons under Section 503 of the Rehabilitation Act, 13 Valparaiso L. Rev. 453, 465, 467 (1979) 13

Stewart and Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1311 (1982) 28

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IN THE

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WILLIAM FISHER,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner William Fisher respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed and entered November 23, 1981.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 663 F.2d 861 and is set forth in Appendix A. The order and opinion of the District Court is unreported and is set forth in Appendix B.

Jurisdiction.

The opinion and judgment of the Court of Appeals was entered on November 23, 1981. A duly filed petition for rehearing and suggestion for rehearing en banc was denied

on March 31, 1982. A copy of the order denying the petition is set forth in Appendix C. The jurisdiction of this Court is unvoked under 28 U.S.C. Section 1254(1).

Statutes Involved.

The statutes involved, 29 U.S.C., §§ 701(1) and (8), 793, and 794a, are set forth as Appendix D.

Statement of the Case.

A. Petitioner's amended complaint alleged that petitioner was an honorably discharged veteran who served in the United States Air Force in the years 1964 to 1968. He achieved experience as an aircraft mechanic and maintenance technician. His educational background brought him an Associate of Applied Sciences in Electronics Technology; his practical experience additionally was acquired in the field of electronics.

In October 1976, petitioner took a civil service examination for a permanent position as "industrial electronics technician I". Petitioner received the highest score on the examination. Together with two other persons, petitioner was invited to a final interview with the city's transportation department traffic engineer division. At the interview, petitioner stated that he hd suffered a lower back injury for which treatment was required, but that he had largely recovered from the injury. Petitioner asserted that he could perform the work required, but he was nevertheless denied employment solely because of alleged physical disability. Petitioner alleged in the complaint that he "was and is capable of performing the duties required of an industrial electronics technician I", and that petitioner's technical and practical qualifications exceeded those of the individuals finally hired.

It was further alleged that a complaint was thereafter filed with the United States Department of Labor. The Department found petitioner to be a handicapped person within the meaning of 29 U.S.C. Section 706(6) and the respondent a federal contractor within the meaning of Section 503. The department nevertheless informed petitioner that the Department had determined that petitioner was not physically able to perform the duties of the job, and that the Department intended no further action on the matter.

The complaint alleged that respondent, in violation of Section 503, had denied petitioner employment solely because petitioner suffers from a physical disability not directly related to performance of the work required therein. Petitioner stated that by virtue of 29 U.S.C. Section 706(6), he was entitled to be free from that discriminatory conduct which Section 503 prohibits.

The respondent moved to dismiss the complaint on the ground that the District Court lacked jurisdiction because the claims allegedly did not arise under the Constitution, laws, or treaties of the United States.

B. The District Court granted the motion to dismiss upon the ground that petitioner failed to state a claim for which relief could be granted. The District Court held (Appendix B) that petitioner did not have an independent cause of action under Section 503. The court decided that Congress intended the administrative remedies to be exclusive; that an independent right of action would be inconsistent with the existing enforcement scheme.

C. In a divided opinion, the Court of Appeals affirmed (Appendix A). The majority assumed, for purposes of the appeal, the truth of the facts alleged in the amended complaint. The same majority found and decided, contrary to the majority opinion of the Fifth Circuit in *Rogers v. Frito-*

Lay, Inc., 611 F.2d 1074, *cert. den.* 449 U.S. 889 (1980), that the statute creates "a federal right" on behalf of the protected class. It was apparent, stated the majority, that Congress did intend to confer some federal rights on handicapped individuals. Nevertheless, the majority concluded that it would not imply a private cause of action since the statute on its face does not prohibit discrimination; since the legislative history failed to furnish a clear indication of congressional intent; and because a private cause of action might conflict with the administrative enforcement scheme.

Judge Fletcher dissented from the majority's holding. She held that a critical examination of legislative history indicated clearly that "Congress understood section 503 to include a private enforcement right". Moreover, since the court was unanimous in holding that Congress had enacted Section 503 for the especial benefit of handicapped persons and created a federal right on their behalf, Judge Fletcher was of the opinion that it was not necessary to show an express intention on the part of Congress to create a private cause of action, no explicit purpose to deny such cause of action having been shown. Reliance was placed on this Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), and *Cort v. Ash*, 422 U.S. 66, 82 (1975). The dissenting Judge also could find no ground for concluding that a private right of action would be inconsistent with the legislative scheme established by Section 503, especially since the Department of Labor had found no inconsistency between private and administrative enforcement and, indeed, had repeatedly expressed its opinion "that a private right of action would complement the administrative mechanism".

REASONS FOR GRANTING THE WRIT.

I.

THE UNANIMOUS FINDING OF THE COURT BELOW THAT THE CONGRESSIONAL ENACTMENT CREATED A FEDERAL RIGHT ON BEHALF OF PETITIONER SUPPORTS THE IMPLICATION OF A PRIVATE RIGHT OF ACTION ON BEHALF OF PETITIONER.

The court below found that there existed in favor of petitioner a clearly articulated federal right. This Court has continually held that where federal law clearly provides an individual with rights under federal law, proof of an explicit congressional intent to create a private remedy is not necessary. While subsequent discussion will establish that Congress did in fact intend to provide judicial relief to qualified handicapped persons for alleged violations of Section 503, this initial discussion is concerned with a person's access to the courts where rights concededly vested in such person by the Congress have been violated. The uniform holding has been that the right to judicial remedies for violations of vested rights is fundamental under the Constitution and laws of the country.

As early as 1803, the Court stated:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163.

This basic principle has been reiterated under various circumstances up to the present time. Thus, in *Tunstall v. Brotherhood*, 323 U.S. 210, 213 (1944):

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted."

Five years later, the Court stated:

> "The existence of a statutory right implies the existence of all necessary and appropriate remedies . . . . [I]s a federal rule responsive to the need whenever a federal right is impaired." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-240 (1969).

In *Cort v. Ash*, 422 U.S. 66, 78, 82 (1975), the Court's initial inquiry was:

> "Does the statute create a federal right in favor of the plaintiff?",

and affirmed that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." (Court's emphasis). This statement was reiterated in *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979).

In *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), the Court observed:

> "It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But in those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties."

In *California v. Sierra Club*, 451 U.S. 287, 294 (1981) the Court stated that the question is "whether Congress intended to confer federal rights upon these beneficiaries."

The court below was unanimous in finding that Section 503 creates a federal right on behalf of qualified handicapped persons, 663 F.2d at 863, 867-868. Other courts following *Frito* have denied that the statute was enacted for the especial benefit of handicapped persons. Yet vigorous dissents have been registered to these opinions. See, Judge Goldberg dissenting in *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085-1109 (5 Cir. 1980); Judge Kaufman dissenting in *Davis v. United Air Lines, Inc.*, 662 F.2d 120, 127-130 (2 Cir. 1981); and Judge Fletcher dissenting in the case herein, 663 F.2d at 867-871. In addition, the district courts which have considered the question of an implied right of action under Section 503 are fairly evenly divided. *See, Davis v. United Air Lines, Inc., supra*, 662 F.2d at 121, fn.2.

The court below has decided an important question of law which has not been, but should be, settled by this Court. The question is an important one and of a recurring nature, made apparent by the conflicting views expressed by lower federal courts and judges. The conflict, it is submitted, should be resolved by this Court so that a rule will be enunciated which can be applied uniformly in Section 503 cases.

II.

SECTION 503 IS A BROAD REMEDIAL CIVIL RIGHTS MEASURE INTENDED TO PROTECT QUALIFIED HANDICAPPED PERSONS FROM DISCRIMINATORY EMPLOYMENT PRACTICES. UNDER SUCH CIRCUMSTANCES, THE COURTS HAVE UNIFORMLY IMPLIED A PRIVATE CAUSE OF ACTION ON BEHALF OF THE MEMBERS OF THE PROTECTED CLASS.

There is an additional consideration involved here. Section 503 is not merely an economic measure. The Rehabilitation Act recognizes that handicapped persons have a

federally protected right to be free from discrimination. Congress and the executive have recognized and affirmed this right again and again. The regulatory agencies have specifically recognized the right, including the federal agency here involved. Indeed, it is fair to argue that the enactment by Congress of the provisions of the Rehabilitation Act were intended to secure individual due process and equal protection rights under the Constitution. In any event, this Court has always given the broadest sweep possible to congressional statutes aimed at eliminating invidious discrimination.

As early as 1944, in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, and *Tunstall v. Brotherhood*, 323 U.S. 210, the Court held that black employees had an implied right of action to sue under the statute against the union and employer to be relieved from discriminatory agreements entered into by the union and management. The Court held that the Railway Labor Act imposed a duty upon the union as exacting "as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates . . . Congress plainly did not authorize the bargaining representative to make such discriminations." 323 U.S. at 202-203.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), individual voters were deemed to have an implied right to challenge state voting measures under section 5 of the Voting Rights Act of 1965, despite the fact that the act granted enforcement authority to the Attorney General of the United States. This Court stated:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely upon litigation instituted at the discretion of the Attorney General . . . The guarantee of section 5 . . . might well prove an empty promise

> unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 556-557.

In *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court made it clear that the congressional enactment had provided the welfare recipients with personal federal rights, and stated:

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420.

Other decisions of this Court in equal rights cases brought under federal statutes, such as *Lau v. Nichols*, 414 U.S. 563 (1974); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); and *Cannon v. University of Chicago*, 441 U.S. 677 (1979), all recognized explicitly or implicitly that private rights of action were implicated in these civil rights laws.

Lower courts have also recognized private litigation in federal courts as an important tool for the advancement of civil rights. *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5 Cir. 1967), *cert. den.* 388 U.S. 911 (1967) (standing to assert under federal statute right to equal educational opportunities); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5 Cir. 1969) (migratory farm workers under Wagner-Peyser Act have implied rights and remedies against employers and state officials); *Euresti v. Stenner*, 458 F.2d 1115 (10 Cir. 1972) (indigents have implied civil remedy to enforce the provisions of Hill-Burton

Act); *Montgomery Improvement Ass'n., Inc. v. United States Department of H.U.D.*, 645 F.2d 291 (5 Cir. 1981) (low and moderate income residents have implied rights of action under Civil Rights and Federal Housing Acts).

There are a number of common threads running through these civil rights cases involving discriminatory conduct of various character. The fact that Congress provided for administrative enforcement did not bar the finding of an implied right of action. Courts have not found that implication of a private action would be inconsistent with the purpose of the civil rights statutes. Those statutes are intended to protect the rights of all individuals from discrimination and the protection of each individual is therefore consistent with the broader interest which the statutes seek to protect. The courts have generally considered the basic congressional policies in enacting the legislation as a factor in determining whether an action should be implied. Consideration has been given to the fundamental purpose of civil rights legislation and the extent to which implication of federal rights would aid in furthering such legislation.

It is, therefore, not only the fact that the court below found that Section 503 created a federal right on behalf of the petitioner, but also that the statute is in the field of civil rights, which leads to the conclusion, that private rights of action exist under Section 503. That the statute is a civil rights law and forbids discrimination can hardly be doubted. Indeed, "the obligation to take affirmative action imports more than the negative obligation not to discriminate". *Southern Illinois Builders Ass'n. v. Ogilvie*, 471 F.2d 680, 684 (7 Cir. 1972). The contractual obligation of the respondent in this case required it not to discriminate against petitioner, as the court below recognized, in accordance with the agency's interpretation of § 503. 41 C.F.R. § 60-741.4.

III.

THE STANDARDS AND CRITERIA ENUNCIATED BY SUPREME COURT DECISIONS FOR THE IMPLICATION OF PRIVATE REMEDIES ARE ALL MET IN THIS PROCEEDING. SECTION 503 CREATES A FEDERAL RIGHT IN FAVOR OF PETITIONER; CONGRESS INTENDED TO CREATE SUCH A REMEDY; AN IMPLIED REMEDY IS CONSISTENT WITH THE LEGISLATIVE SCHEME; AND THE CAUSES OF ACTION ARE NOT TRADITIONALLY RELEGATED TO STATE LAW.

In this section of the petition, the purpose is to show that the right of petitioner to judicial remedies under Section 503 is consistent with the decisions of this Court in the cases where a private action has been implied and readily distinguishable from the decisions where an implied cause has been denied.

A. The State of the Law at the Time Section 503 Was Enacted in 1973 Supports Petitioner's Contention That Congress Intended Handicapped Persons to Have a Private Cause of Action Under Section 503.

In *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916), the Court stated:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ."

Here, the statute has been enacted for the especial benefit of qualified handicapped persons seeking employment; the petitioner on this record has been concededly denied employment and not granted any priority despite his qualifications, and solely because of his handicap.

In *J. I. Case Co. v. Borak*, 377 U.S. 426, 432-433 (1964), the statement of the Court included the following:

> "While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors', which certainly implies the availability of judicial relief where necessary to achieve that result. . . . We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

Section 503 has as its chief purpose the protection of qualified handicapped persons seeking employment. If the congressional purpose is to be made effective, it is clearly necessary to make judicial relief available.

In *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 200, 204 (1967), the Court observed:

> "But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures [removal and sale of craft, criminal penalties] to be exclusive of all others. . . . We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act."

There is not the slightest indication in the language of Section 503 or its legislative history that Congress intended the administrative mechanism provided in the law as the exclusive remedy for enforcement of the Act.

If contemporaneous administrative construction is significant, it is not unimportant that the agency has informed a court that

> "the complainants should have a private right of action under Section 503, and that they should be permitted to pursue such actions without first exhausting the Department of Labor's administrative process." *Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1108.

In 1980, the Department of Labor again, in *Chaplin v. Consolidated Edison Co. of New York, Inc.*, 482 F.Supp. 1165, 1174 (S.D. N.Y. 1980), "submitted data indicating the increasing backlog faced by the office of over two thousand pending section 503 claims". The regulations permit the handicapped person to file a complaint; thereafter, the matter is solely between the agency and the contractor, and any action taken is at the discretion of the agency. C.F.R. 60-741.20 to 741.32.

A critical examination has concluded that the Department of Labor's Office of Federal Contract Compliance Programs

> "has a dismal record of success in effectuating the rights guaranteed by Section 503 . . . the prospective benefits to individual handicapped persons under Section 503 are in serious danger of being diluted unless the beneficiaries of the Act are given powers to ensure enforcement."

Note, *Private Rights of Action for Handicapped Persons under Section* 503 of the Rehabilitation Act, 13 Valparaiso L.Rev. 453, 465, 467 (1979). Under the circumstances, it can hardly be doubted that a private action is necessary to ensure the full effectiveness of Section 503, and plainly such private action will not be inconsistent with the law or the regulations, as the agency has itself urged.*

The standards and criteria enunciated in other cases, *supra*, such as *Tunstall v. Brotherhood, Sullivan v. Little*

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*The budget of the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor has been reduced significantly in fiscal year 1982 and would be reduced further by the proposed 1983 budget. The 1983 budget request has been written for a simplified, scaled down enforcement program which "calls for initiating fewer compliance reviews, severely restricting those it does initiate, and eliminating preaward reviews altogether. With such policy changes, OFCCP . . . will have a less effective program for carrying out its enforcement responsibilities." U.S. Commission on Civil Rights. *The Federal Civil Rights' Enforcement Budget:* Fiscal year 1983, pp. 40-41 (June, 1982).

Hunting Park, Steele v. Louisville & Nashville R.R. Co., Allen v. State Board of Elections, and *Rosado v. Wyman* are all, it is submitted, similarly consistent with the implication of a private action under Section 503. The lower courts uniformly throughout the years followed the standards enunciated by this Court.

This was the state of the law, the legal climate, at the time of the enactment of the Rehabilitation Act in 1973.

B. A Private Cause of Action Under Section 503 Is Also Mandated Under the Court's Decisions Subsequent to the Enactment of Section 503.

In 1974, this Court decided *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453. The suit was brought to enjoin the discontinuance of certain passenger trains. The action was instituted by an association of passengers, although the statute authorized only the Attorney General to bring suits in court. The legislative history indicated an intention to preclude private causes of action. Private lawsuits in multiple areas to prevent discontinuance of uneconomic railroads were deemed by this Court obstructive of congressional purpose. This Court held that the inference of a private cause of action must be consistent with legislative intent and with "the effectuation of the purposes intended to be served by the Act". 414 U.S. at 458, citing *Borak*. Here, in petitioner's case, Congress intended to grant federal rights to the handicapped and, as petitioner has shown, such enforcement is necessary to effectuate the salutary purposes which led to the enactment of Section 503. The *Amtrak* decision is therefore in no way incompatible with the implication of a private action under Section 503.

In *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975), the Court held that failing broker-dealers

had no implied right of action under the law to compel a public corporation organized under the law to act for their benefit, the Securities and Exchange Commission having the statutory authority to compel the corporation to act. Private actions might precipitate liquidations which the corporation might avoid. This Court, however, was careful to distinguish *Borak* and *Allen*, 421 U.S. at 423-425. In *Borak*, the "broad remedial purposes" of the Act and the agency's representation that private enforcement was necessary to effectuate those purposes justified the implication of a private action for damages, stated the Court. In *Allen*, it was consistent with the broad purpose of the Act to allow the private action, especially where the statutory enforcement authority of the Attorney General was hobbled in practice. It is these latter considerations which are applicable in these proceedings.

Cort v. Ash, 422 U.S. 66 (1975) was a suit by a stockholder against directors of a corporation alleging violations of a statute prohibiting corporate contributions in certain federal elections. The Court could find no clearly articulated federal right in the statute; no legislative history to support implication; no possibility of furthering the statutory purpose; and the suit was in an area primarily of state concern.

The first factor which the Court considered relevant in determining whether a private remedy "is implicit in a statute" was whether the plaintiff was one of the class for whose *especial* benefit the statute was enacted — "that is, does the statute create a federal right in favor of the plaintiff?" (422 U.S. at 78). The court below in this proceeding was unanimous in answering this question in the affirmative so far as the petitioner here is concerned.

The second factor involved any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one. As far as Section 503 is concerned, no

supportable argument has been advanced to substantiate any claim that Congress, explicitly or implicitly, intended to deny a private action seeking enforcement of the statute. Moreover, this Court stated in *Cort* that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action" (422 U.S. at 82) (Court's emphasis).

In fact, the legislative history, as well as the textual language of the Rehabilitation Act, indicate, explicitly and implicitly, congressional intent to vest a private cause of action in qualified handicapped persons seeking employment with federal contractors. From the inception of the statute, Congress, through its committees and its members, primarily emphasized that the purpose of the Rehabilitation Act is to secure employment for qualified handicapped persons.

The reports of the Senate Committee on Labor and Public Welfare and the House Conference which followed, clearly reveal a desire on the part of the entire Congress to maximize employment opportunities for handicapped and the removal of all barriers, in law or in fact, against the achievement of such objective. S.Rep. No. 93-318 and H.Conf.Rep. No. 93-500, in 2 U.S. Code Cong. and Adm. News 2076-2154 (1973). Indeed, the congressional declaration of purpose in 1973 called for programs to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment". 29 U.S.C. § 701(8). Senator Humphrey, at the time of the passage of the law, welcomed the "program under which the federal contractors shall undertake to employ and advance in employment qualified handicapped individuals. . . . The time has come to firmly establish the right of these Americans." (119 Cong.Rec. 635 (1973)).

In calling for the White House Conference on Handicapped Individuals in 1974, Congress found that it was "of critical importance" to the nation that "equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps" and that special consideration was required "assuring individuals with handicaps of equal opportunity with others to engage in gainful employment" (Title III of Pub.L. 93-516, Dec. 7, 1974, 88 Stat. 1631-1634). Under these circumstances, it is appropriate to infer that Congress at least implicitly expected, in view of the then state of the law, that judicial remedies would be available to handicapped persons wrongfully denied employment because of their handicap.

When Congress in 1974 enlarged the definition of "handicapped individual" 29 U.S.C. § 706(6), Pub.L. 93-516, Title I, Section 111(a), Dec. 7, 1974, 88 Stat. 1619, the law was

> "intended to make clearer that the coverage of Sections 503 and 504 extend to persons who have recovered — in whole or in part — from a handicapping condition . . . but who may be discriminated against or otherwise be in need of the protection of sections 503 and 504" (S.Rep. No. 93-1297 in 4 U.S. Code Cong. and Adm. News 6389 (1974)).

The Senate Committee emphasized that the definition "includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having" (Id., 6389-6390). "The new definition applies to section 503, as well as to section 504" (Id., 6390). Stated the Committee: "It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result" (Id., 6391). The new definition would provide greater lat-

itude "for the nondiscrimination programs carried out under sections 501, 503, and 504" (Id., 6413). Senator Stafford, who served on both the 1973 and 1974 Committees stated to a largely supportive Senate that

> "it was the committee's intent that the enforcement under sections 503 and 504 would be similar to that carried out under section 601 of the Civil Rights Act and 901 of the Education Amendments of 1972" (120 Cong.Rec. 3055 (1974)).

The addition of Section 505 to the Rehabilitation Act in 1978 made the congressional intent with respect to the Act of 1973 patently clear. Section 794a(b) specifically provides that

> "in any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Congressional committee stated that the law "permits courts to award attorney's fees to successful parties in judicial actions to enforce the provisions of Title V" (H.Rep. No. 95-1149 in 6 U.S. Code Cong. and Adm. News 7313 (1978).

> "The new section permits courts, at their discretion, to award to the prevailing party, other than the United States, in any action or proceeding to enforce sections 501, 503 or 504 of the act, a reasonable allowance" (Id., 7332, 7352).

The Senate Report emphasized that the

> "rights extended to handicapped individuals under Title V, that is, . . . employment under federal contracts . . . are and will continue to be in need of constant vigilance by handicapped individuals . . . and the availability of attorney's fees should assist in vindi-

cating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504" (S.Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978)).

See also, Judge Goldberg's discussion in *Frito-Lay* of the legislative history and the senatorial comments of those intimately connected with the Act from the beginning. 611 F.2d at 1093-1098.

The court below agreed that in 1978 "Congress gave a clear expression of its assumption that it had created a private right of action in enacting section 503", but the court nevertheless concluded that "Congress did not intend to create a private right of action when it enacted section 503". It appears to be an unusual conclusion for the federal judiciary to make that the Congress did not intend certain action, when Congress by statute and clear legislative history indicates that Congress did so intend.[19] The ruling, it

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[19]Senator Birch Bayh in a Foreword to the *Symposium Issue on Employment Rights of the Handicapped*, 27 De Paul L.Rev. 943 (1978) stated:

"The right to work is one of the most basic of all our cherished rights. Work gives an individual not only economic self-sufficiency, but also a sense of dignity, self-worth, and the satisfaction of making a contribution to our society. Over the past decade, this nation has witnessed a growing awareness of the employment rights of many disadvantaged groups in our society. Women and minorities, under the protection of the Civil Rights Act of 1964, have begun to make substantial inroads into the labor market. Until the past few years, however, we have largely ignored the employment rights of another disadvantaged groups, our nation's handicapped. The federal government has made a commitment to end this 'unconscionable discrimination' against our nation's handicapped. Beginning in 1948, with the congressional enactment of Public Law 87-614, which prohibited the Federal Civil Service from discriminating against a person due to physical handicap, and ending with the signing of the final regulations implementing Section 504 of the Rehabilitation Act of 1973 . . . the federal government has established the legal framework with which to end employment discrimination for a majority of handicapped Americans. The federal government accepted this commitment on the grounds of both simple justice as well as economic

(footnote continued on following page)

is respectfully submitted, is akin to judicial legislation and an apparent disregard of the respect ordinarily accorded a co-equal arm of government.

Note, *Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973*, 79 Mich.L.Rev. 1093, 1111-1112 (1981).

Only recently, the Court acknowledged that postenactment developments cannot be ignored concerning the scope and purpose of a statute. In *North Haven Board of Education v. Bell*, ___ U.S. ___ (May 17, 1982), Title IX of the Education Amendments of 1972 was given the broadest of constructions, not only because of its 1972 history, but also because of a congressional and administrative history extending into 1975. The Court on a number of occasions has paid deference to subsequent legislative express intent with

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considerations. To the extent that the skills of the approximately nineteen million handicapped Americans go untapped, our basic economy suffers. Regretably, the employment of handicapped individuals impairs not only their opportunity for self sufficiency, but frequently has ramifications for the nation, as these families frequently turn to welfare . . . . Congressional enactment of the Rehabilitation Act of 1973 may be one of the most important pieces of legislation in our nation's history. Its civil rights provisions have the potential to elicit fundamental changes in many facets of American life . . . . Even though various provisions of the Rehabilitation Act have been subject to only limited testing in the courts, some of the initial early cases brought on the basis of Section 501, 503, or 504 are encouraging. Others, however, have shown an unfortunate misunderstanding of both the obligations imposed by the law and the regulations as well as congressional intent in formulating the laws. It is particularly important to emphasize the desire of the Congress to make the Rehabilitation Act a sweeping guaranty of civil rights of the handicapped, particularly their employment rights. . . . While there is no definitive legislative history providing an explicit statement creating a private cause of action under Section 503, the reasoning of the federal district court in *Drennon v. Philadelphia Greater Hospital*, [428 F.Supp. 809 (E.D. Pa. 1977)] is persuasive. The court held that the absence of legislative history did not negate a private cause of action under the Rehabilitation Act." Senator Bayh played a major role in the Senate in connection with employment discrimination. See *North Haven Board of Education v. Bell*, ... U.S. .... (No. 80-986, May 17, 1982).

respect to statutes formerly enacted. *See, NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, fn.8 (1974) ("We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381, fn.8 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958) ("But the later law is entitled to weight when it comes to the problem of construction"). *See also, Fullilove v. Klutznick*, 448 U.S. 448 (1980).

The third and fourth *Cort* factors are also satisfied in this case, it is submitted. It is clearly consistent with the underlying purposes of the legislative scheme to imply a private action for the petitioner. Since only qualified handicapped individuals are protected under Section 503, there is no danger that private actions will result in inconsistent interpretations of the requirements of the act. Discrimination on the basis of handicap can only be justified if substantially related to business necessity, and courts already possess expertise in dealing with discrimination in other areas. Here, discretionary administrative enforcement relies ultimately on debarment for non-compliance. A private action seeking relief for an alleged violation is compatible with administrative enforcement, and is the only means of petitioner's receiving the personal rights granted him by Congress. The agency, in fact, has agreed that a private action would be an effective supplement to enforcement of Section 503.[19a]

[19a] "Moreover, even if alternative remedies are available and their existence is relevant, but cf. *Cannon v. University of Chicago*, 441 U.S. at 711; Comment, 129 U.Pa. L.Rev., at 442-446, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination. See, e.g., *Electrical Workers v. Robbins and Myers, Inc.*, 429 U.S. 229, 236-239 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975); *Alexander v. Gardener — Denver Co.*, 415 U.S. 36, 47-49 (1974)." *North Haven Board of Education v. Bell* ___ U.S. ___ n.26 (No. 80-986, May 17, 1982).

The argument that judicially applicable standards are not available also appears without merit. The vast experience of the courts in dealing with equal opportunity concepts, and with discrimination based on criteria unrelated to job performance, indicates that the courts can deal with discrimination on the basis of handicap to fashion an appropriate judicial remedy.

Finally, virtually all courts are agreed that protection from employment discrimination for the handicapped has not been an area of traditional state interest or concern. The federal government has been instrumental in combatting employment discrimination against the handicapped

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), the Court held the tender offeror did not have an implied remedy against the management of the target corporation under provisions of the Securities and Exchange Act. The Court held that the sole purpose of the statute was the protection of investors; that tender offerors, the class regulated by the statute, were not the intended beneficiaries of the legislation. The first *Cort* factor was not even met. The Court did reiterate, however, in *Chris-Craft* that "where Congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute" (430 U.S. at 25), pointing to *Borak*. Moreover, again distinguishing *Borak*, the Court found no basis to support the argument that a damage action in favor of the regulated offeror would ensure the fulfillment of Congress' purpose to protect the investors. 430 U.S. at 41.

Cannon v. University of Chicago, 441 U.S. 677 (1979), a discrimination case under Title IX, again resulted in an implied private action. The *Cort* factors were all satisfied. The Court noted that with one exception, not relevant here,

"this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case" (441 U.S. at 690, fn. 13). The *Cannon* decision recognized that mere legislative silence is no reason for denying a plaintiff a judicial remedy where the legislature has granted a class of persons federal rights (441 U.S. at 694). The Court recognized that in evaluating congressional intent in 1972, the Court "must take into account its contemporary legal context" (441 U.S. at 698-699). Again, the Court found a private action entirely consistent with the purposes of the law and necessary for its enforcement. If the use of federal resources to support discriminatory practices is to be avoided, and individual citizens given effective protection against these practices, then the award of individual relief to a private litigant might not only be sensible, instead of an entire cut-off of funds, "but it is also fully consistent with — and in some cases even necessary to — the orderly enforcement of the statute" (441 U.S. at 706). Finally, this Court observed that provision for an administrative remedy in the law was not in itself a ground for assuming that Congress had not intended an otherwise appropriate judicial remedy for the class benefited by the statute. (441 U.S. at 711).

The *Cort* and *Cannon* decisions pointedly support the implication of a private action under Section 503. Each of the factors are satisfied: the grant of federal rights, congressional intent revealed in the text and legislative history, the consistency of a private action with the effective enforcement of the statute, and the matter involved one of particular federal concern.

The subsequent rulings of the Court, where private actions were not implied, are substantively distinguishable from the proceedings herein. Thus, in *Touche Ross & Co. v. Red-*

ington, 442 U.S. 560 (1979), customers of a broker-dealer were suing an accounting firm for damages under a provision of the Securities and Exchange Act. The Court determined that nothing in the statutory language or legislative history gave the slightest evidence that Congress intended, explicitly or implicitly, to create a private action. The Court recognized, however, that implied private remedies might arise where "the statute in question at least prohibited certain conduct or created federal rights in favor of private parties" (442 U.S. at 569).

In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court stated: "This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available" (444 U.S. at 18). The Court decided that since Section 215 of the Investment Advisers Act of 1940 made certain advisers contracts "void", a right to specific relief could be implied. The power to avoid a contract includes the right to resort to a court to have the contract rescinded and to obtain restitution of consideration paid, it was stated. Petitioner discusses hereafter the significance of the contract requirements of the statute and regulations which Congress specifically intended for his benefit as an additional basis for the implication of private action. As to the other section of the statute in *Transamerica*, the Court declined to find an implied action in the light of the many specific criminal and civil penalties provided in the law.

In *Universities Research Ass'n., Inc. v. Coutu*, 450 U.S. 754 (1981), the Court declined to imply a private contract action for back wages under the Davis-Bacon Act where it had been administratively determined that the contract did not call for work subject to the act and therefore did not contain prevailing wage stipulations. The Court held that

the legislative history indicated a clear intent on the part of Congress not to create a private remedy where there were no prevailing wage stipulations in the contract. The Court left open, however, the question of whether the act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations (450 U.S. at 769).

In *California v. Sierra Club*, 451 U.S. 287 (1981), the action was by private parties suing under the Rivers and Harbors Appropriation Act of 1899. It was sought to enjoin the construction and operation of certain water diversion facilities. This Court held that "the four factors specified in *Cort* remain the criteria through which this (congressional) intent could be discerned" (451 U.S. at 293). The Court held that the statute and the legislative history clearly indicated that "Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways" (451 U.S. at 296).

Finally, at the close of the October 1981 term, the Court, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 102 S.Ct. 1825 (May 3, 1982), implied a private action or actions under the Commodity Exchange Act by investors in futures contracts against commission merchants or brokers. Again, pointing to *Cannon*, the Court noted that the mere failure to explicitly provide for a private remedy did not mean that Congress did not intend "to have such a remedy available to the persons benefited by its legislation" 102 S.Ct. at 1837. More important, stated the Court, at the time of the comprehensive amendments to the act in 1974, the federal courts routinely recognized an implied private cause of action. Therefore, evaluation of congressional action "must take into account its contemporary legal context" 102 S.Ct. at 1841.

> "More precisely, we must examine Congress' perception of the law that it was shaping or reshaping . . . it is always appropriate to assume that our elected representatives, like other citizens, know the law" Id.

As petitioner has heretofore shown, at the time of the enactment of the Rehabilitation Act, including Section 503, in 1973, the Court uniformly implied private actions in cases where Congress, by its enactments, intended to create federal rights, and in the civil rights areas where the broad remedial enactments required full effectuation by private judicial remedies.

IV.

SECTION 503 CREATES A PROPERTY ENTITLEMENT IN PETITIONER AND VINDICATION OF PETITIONER'S ENTITLEMENT BY A PRIVATE ACTION WOULD SATISFY DUE PROCESS AND EFFECTUATE CONGRESSIONAL PURPOSES.

In the context of a law entitled the Rehabilitation Act, expressly intended to protect the rights of handicapped persons, it is a basic misconception to view the law as merely imposing a duty on the regulatory agency and a corresponding duty by the federal contractor solely to the agency. Such a thesis totally disregards the wishes of Congress and the purposes of the law. In effect, despite the plain purpose, reflected in the law, legislative history and regulations, to vest personal rights in the handicapped, the mere lack of a verbal formula is employed to undermine legislative authority.

The purpose of Section 503 is the protection of the basic personal rights of handicapped persons. The statute created a protected property entitlement in the petitioner here. The entire purpose of the statute and the regulations is to vindicate the individual entitlements of qualified handicapped

persons seeking employment, and private rights of action are needed to effectuate that purpose.

The statute mandates an affirmative action contract "to employ and advance in employment qualified handicapped individuals" and "if any handicapped individual" believes that there has been a violation or refusal to comply with the agreement, it is the handicapped individual who may file a complaint. 29 U.S.C. Section 793(a)(b). The contract required by the regulations (41 CFR, 60-741.4) provides, among other things, that

> "the contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified".

The statute and the regulations are plainly intended to confer rights and benefits upon the handicapped. While duties have been laid upon the agency and contractor, the intended beneficiary of the performance of these duties is the qualified handicapped individual. The rights of that individual were and are Congress' angle of vision.

It is unnecessary here, it is submitted, to explore ordinary contract analysis involving third party beneficiaries. Privity of contract between the plaintiffs and defendants has never been a fixed condition precedent to the implication of a private remedy for a statutory violation that injured the plaintiffs, members of the protected class. Whether the statute deals with federal assistance grants to state programs or agreements with federal contractors, the important fact is that the limitations contained in the grant or the provisions in the contract are actually additional evidence to support the individual's entitlement, to support the ability to enforce a statutorily authorized vested federal right.

> "The common law itself is inevitably a trilateral set of relations among rightholders, duty bearers, and government. The existence of that trilateral relation has not inhibited the recognition of entitlements on the part of rightholders to government protection of their rights against defaulting duty-bearers."

Stewart and Sunstein, *Public Programs and Private Rights*, 95 Harv.L.Rev. 1195, 1311 (1982).

In *Lau v. Nichols*, 414 U.S. 563 (1974), the suit was by students against the school district receiving federal financial assistance under provisions of the Civil Rights Act of 1964. This Court noted that the "school district contractually agreed" to comply with the statute and all requirements imposed by the HEW regulations and that violation of that agreement called for the "fashioning of appropriate relief" to the students. 414 U.S. at 568-569.

Again, in *Rosado v. Wyman*, 397 U.S. 397 (1970), the class benefited were welfare recipients. The federal statute, an assistance program under the Social Security Act, invalidated any state program (receiving the federal funds) that substantially altered the content of the need of the welfare individuals in such a way that it was less than it was prior to the enactment of the specific provision of the federal law.

> "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420.

See also, Gomez v. Florida State Employment Service, 417 F.2d 569 (5 Cir. 1969).

The recent decision of the Court in *Logan v. Zimerman Brush Co.*, ___ U.S. ___, 102 S.Ct. 1148 (1982), recognizes the rights of regulatory beneficiaries and details the broad scope of individual entitlements, "types of interests

. . . relating to the whole domain of social and economic fact" (102 S.Ct. at 1155).

In short, the private right of action here against the federal contractor is a means of securing due process protection for the entitlement which Congress has specifically bestowed.

Conclusion.

The evidence garnered from the text of the statute, its legislative history and avowed purposes, firmly establish that Congress contemplated private enforcement of Section 503. Congress intended that the private right of action by the handicapped individual would ensure the enforcement of specific congressional policies. The judicial function is appropriately exercised when, consistent with the intent of the people's representatives, private remedies are provided to effectuate and enforce the legislative will. The implication of private action under Section 503 would be consistent with law and simple human justice.

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Dated: June 18, 1982.

Respectfully submitted,

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